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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 839

EARL E. WRIGHT, JR., ET AL.,

Petitioners,

—v.—

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Claims in this case.

Opinions Below

The opinion of the Court of Claims (Appendix A, *infra*, pp. 1a-2a) is not officially reported. The opinion of the Court of Claims in the companion case of *Merlin M. Armstrong* v. *United States* (Appendix A, p. 2a, *infra*.) is not officially reported.

Jurisdiction

The judgment of the Court of Claims was entered January 14, 1959 (Appendix A, *infra*, pp. 1a). The jurisdiction of this Court is invoked under 28 U. S. C. Sections 1255(1) and 2101(c). The Court of first instance obtained jurisdiction under 28 U. S. C. Section 1491.

Questions Presented

1. In the enactment of the Federal Employees Pay Act of 1945, did the Congress, in the use of the words "employees * * * shall be compensated for all hours of employment" intend to exclude from the hours during which they were required to remain at their post of duty on the employer's premises, on the alert in case of alarm, those hours which they devoted to sleeping and eating.

2. Is the construction that only two-thirds of all the time on duty is compensable a proper construction of the section of the Federal Employees Pay Act providing that all hours of employment in excess of 40 shall be compensable at overtime rates.

Statutes Involved

Federal Employees Pay Act of 1945 (59 Stat. 295):

"Sec. 201. Officers and employees to whom this title applies shall, in addition to their basic compensation, be compensated for all hours of employment, officially ordered or approved, in excess of forty hours in any administrative work week, at overtime rates, as follows * * *."

Regulations Involved

Department of the Navy; Navy Civilian Personnel Instructions, (N.C.P.I.):

"Rule N.C.P.I. 85.4-4:

STANDBY DUTY: When an employee is placed in a standby status he is placed in a duty status which under decisions of the Supreme Court (323 U. S. 126) is subject to compensation. As here used, 'standby

status' and 'standby duty' are synonymous. Both mean 'work' for pay purposes, whether the employee sleeps or idles away his time while awaiting a call to perform actual work."[1]

Statement of the Case

Plaintiffs were employed by defendant as civilian fire-fighters at certain Naval installations, for 72 hours in each administrative work week, consisting of three round-the-clock tours of duty, 24 hours on, 24 hours off. They were required to eat and sleep at the post of duty.

Of the 72 hours of employment each week, they were paid for 48 hours; 40 hours at straight time and 8 hours overtime. They received no compensation for the remaining 24 hours of duty (R. p. 6).

They brought suit in the United States Court of Claims to recover overtime compensation for all hours of employment in excess of forty each week (save the 8 hours of overtime paid for) pursuant to the Federal Employees Pay Act of 1945.

Upon pre-trial conference, the facts were agreed upon to the end that both parties might move the Court for summary judgment on the question of liability alone, pursuant to the lower Court's Rule 38(c).

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[1] N.C.P.I. 85.4-4(a):

"'Standby' Defined—Standby means remaining, on orders from competent authority, at or within the confines of a duty station or designated area, in a state of readiness to perform actual work when the need arises or when called."

N.C.P.I. 85.4-3(b):

"An employee in a non-call status is in a non-work status. He is not entitled to compensation for the period he is in a non-call status for the reasons that (1) his time is his own and (2) no restriction or limit is, or may be, placed on his freedom of movement, or his freedom to engage in personal activities of his selection."

The following facts (among others) were stipulated (R. pp. 31-32):

Part B(1) * * *

(c) During each 24-hour tour of duty (plaintiffs) remained and were required to remain at the station, except when official duties required them to be elsewhere on the station.

(d) Were subject to call at all times throughout each 24-hour tour of duty.

(e) Were permitted to sleep from 7 p.m. to 7 a.m., during each 24-hour tour of duty, and were *required to be in bed* by 11 p.m., at which time a *bedcheck was made to insure the fact.*

* * * * *

(g) All hours of employment in excess of 40 hours in each administrative work week were officially ordered or approved.

* * * * *

(i) Plaintiffs * * * were subject to disciplinary action for unauthorized absences from the post during any part of the tour of duty.

Both sides moved, on cross-motion, for summary judgment. Plaintiffs' motion was overruled, defendant's motion was granted and the plaintiffs' petition was dismissed on January 14, 1959 (Appendix A, p. 1a).

Reasons for Granting the Writ

The decision below holding that Federal civilian employees are not employed for those hours devoted to sleeping and eating during the period they are required to remain at their post on the employer's premises, on the alert in case of alarm, and that such hours are non-compensable because they are

not hours of employment, raises an important question of general applicability as to the proper construction and administration of Federal Pay Act with respect to the compensation of Federal civilian employees on standby duty. The decision below construes the Federal Employees Pay Act of 1945 to mean that in all cases only two-thirds of the hours of employment are compensable. Its importance goes beyond the fortunes of this particular case, and presents a question which has not been but should be settled by the Supreme Court.

The Courts of Appeals for the Seventh and Eighth Circuits have rendered decisions on the question which are in conflict with the decisions of the Courts of Appeals for the Fifth, Sixth and Ninth Circuits upon the same question.

An area of uncertainty has been created by the circumstance that the Courts of Appeals in the said circuits have cited as authority for their conflicting views the decisions of this Court in *Armour & Co.* v. *Wantock*, 323 U. S. 126, and *Skidmore* v. *Swift & Co.*, 323 U. S. 134.

The Court of Appeals for the Eighth Circuit has answered the question both ways, having rendered two decisions which are in conflict with each other, the later decision being in conflict with the decision of the court below.

The court below followed the decisions in the Seventh Circuit and also cited this Court's decisions in *Armour & Co.* v. *Wantock*, *supra* and *Skidmore* v. *Swift & Co.*, *supra*, as authority for its holding.

A resolution of the differences between the Courts of Appeals will create certainty in an area in which certainty is essential, and will provide uniformity necessary to the proper administration of the Pay Act. Clarification of this Court's decisions in *Armour* v. *Wantock*, *supra* and *Skidmore* v. *Swift*, *supra*, is also essential to uniformity of interpretation by the divergent Courts of Appeals.

I

Conflicting Decisions In The Circuit Courts Of Appeals.

The Court of Appeals for the Seventh Circuit in *Bowers* v. *Remington Rand* (1946), 159 F. 2d 114, and in *Bell* v. *Porter* (1946), 159 F. 2d 117, held that sleeping and eating time is not to be counted as working time and is not compensable. Both cases cited the decisions of this Court in *Armour* and in *Skidmore* as authority for so holding.

The Court below held that sleeping and eating time is not working time and is not compensable, citing the decisions of this Court in *Armour* and in *Skidmore*, and the decisions of the Court of Appeals for the Seventh Circuit in *Bowers* v. *Remington Rand, supra*, and *Bell* v. *Porter, supra*, as its authority for so holding.

The Court of Appeals for the Eighth Circuit, in *Rokey* v. *Day & Zimmerman* (1946), 157 F. 2d 734, held that sleeping and eating time is not working time, citing the decisions of this Court in *Armour* and in *Skidmore* as its authority for so holding.

CONTRA. More recently, in *General Electric Co.* v. *Porter* (1953), 208 F. 2d 805, the Court of Appeals for the Ninth Circuit, after considering the contrary holdings in the Seventh Circuit (*Bowers* v. *Remington Rand, supra*; *Bell* v. *Porter, supra*) and in the Eighth Circuit (*Rokey* v. *Day & Zimmerman, supra*) and other contrary decisions of district courts, expressly stated that (it is) "our holding that the firemen are entitled to compensation for sleeping and eating time" and rested its authority for so holding squarely upon the decisions of this Court in *Armour* and in *Skidmore*.

In *Biggs* v. *Joshua Hendy Corporation* (1950), 183 F. 2d 515, the Court of Appeals for the Ninth Circuit held that hours of standby duty devoted to eating are compensable, saying: "He was on call at all times and time thus spent was compensable under the Fair Labor Standards Act. *Armour*

& Co. v. *Wantock*, 323 U. S. 126; *Skidmore* v. *Swift & Co.*, 323 U. S. 134."

Two years subsequent to its holding in *Rokey* v. *Day & Zimmerman*, *supra*, the Court of Appeals for the Eighth Circuit in *Central Missouri Telephone Co.* v. *Councell* (1948), 170 F. 2d 641, held that sleeping time on standby duty is compensable upon the authority of this Court's decisions in *Armour* and in *Skidmore*.

In *F. W. Stock & Sons* v. *Thompson* (1952), 194 F. 2d 493, the Court of Appeals for the Sixth Circuit held that standby time during a period "designated as a lunch period or under any other designation, nevertheless constitutes working time compensable under the Fair Labor Standards Act. This conclusion is supported by *Armour* v. *Wantock*, 323 U. S. 126 . . . ."

Still more recently (1955) the Court of Appeals for the Fifth Circuit, in *Mitchell* v. *Strickland Transportation Co.*, 228 F. 2d 124, after considering the contrary holding in *Rokey* v. *Day & Zimmerman* (8 Cir.), held that all standby time was working time, without deduction for sleeping time, following *General Electric Co.* v. *Porter* (9 Cir.), *supra*, which was decided upon the authority of this Court's decisions in *Armour* and in *Skidmore*.

The area of uncertainty is extended by the additional circumstance that application for certiorari to the Court of Appeals for the Seventh Circuit was denied in the cases of *Bowers* v. *Remington Rand*, *supra* (330 U. S. 843, 1947), and *Bell* v. *Porter*, *supra* (330 U. S. 813, 1947), which held sleep-time non-compensable. Certiorari to the Eighth Circuit on a similar holding was also denied by this Court in *Rokey* v. *Day & Zimmerman*, *supra* (330 U. S. 842, 1947).

The Court of Appeals for the Ninth Circuit, in *General Electric Co.* v. *Porter*, *supra*, took note of the fact that certiorari to the Seventh and Eighth Circuits had been denied by this Court in those cases which held sleeping and eating time non-compensable (*Bowers* v. *Remington Rand*, *supra*; *Bell* v. *Porter*, *supra*; *Rokey* v. *Day & Zimmerman*, *supra*),

but the Court in the Ninth Circuit nevertheless held such time to be compensable in *General Electric Co.*

The application for certiorari to the Court of Appeals for the Ninth Circuit in *General Electric Co.* v. *Porter*, *supra*, was denied by this Court in 347 U. S. 951 (1954).

The decisions of the Courts of Appeals as to the compensability of sleeping and eating time are irreconcilably in conflict with each other. The interpretations of this Court's decisions in *Armour* and in *Skidmore* by the Courts of Appeals in these circuits are diametrically opposed to each other. The denial of certiorari to the conflicting circuits leaves the question unsettled.

Time devoted to sleeping and eating during standby duty cannot at the same time be both compensable and non-compensable under the same statute upon the authority of the same decision by this Court.

This anomalous situation presents a question of Federal law which has not been but should be settled by the Supreme Court.

II

The Decision Below Is Contrary To The Applicable Decisions Of This Court.

The decision below in this case is not in harmony with this Court's decisions in *Armour & Co.* v. *Wantock*, *supra*, or with *Skidmore* v. *Swift & Co.*, *supra*, and is in conflict with *General Electric Co.* v. *Porter* (CA 9, 1953), 208 F. 2d 805; with *F. W. Stock & Sons* v. *Thompson* (CA 6, 1952), 194 F. 2d 493; with *Central Missouri Telephone Co.* v. *Connell* (CA 8, 1948), 170 F. 2d 641; with *Biggs* v. *Joshua Hendy Corporation* (CA 9, 1950), 183 F. 2d 515; and with *Mitchell* v. *Strickland Transportation Co.* (CA 5, 1955), 228 F. 2d 124.

The Court below, in its decision in this case, said (Appendix A, p. 1a, *infra*.):

> "It is another case brought by firefighters claiming compensation for the time they were required to remain at their post of duty but during which they were permitted to eat and sleep. * * * Plaintiffs were in a standby status during all the time they were at their post. * * * Compensation for two-thirds of the 24 hours plaintiffs were on duty seems to us to be a sensible construction of the Federal Employees Pay Act of 1945 (59 Stat. 295)."

The Court below accordingly dismissed plaintiffs' petition (Appendix A, p. 1a, *infra.*) saying:

> "On the authority of the opinion in *Merlin M. Armstrong, et al.* v. *United States*, No. 145-56, this day decided, plaintiffs' motion for summary judgment is overruled. Defendants' motion for summary judgment is granted, and plaintiffs' petition is dismissed."

In *Merlin M. Armstrong* (App. A, p. 3a, *infra.*), the Court below stated at the outset:

> "The basic question presented is what Congress meant by the words 'hours of employment.' Did it intend to include therein time during which an employed was required to remain on the employer's premises but during which he could eat or sleep?"

and the Court below decided that basic question by holding (Appendix A, p. 6a, *infra.*):

> "When Congress passed the Federal Employees Pay Act, we doubt it had in mind the peculiar situation of firefighters, but it does not seem to us reasonable to suppose it meant to compensate an employee merely because he was required to sleep and eat on the employer's premises instead of at home."

This holding below is not in harmony with *Armour* v. *Wantock, supra,* or with *Skidmore* v. *Swift, supra.* The claims in those cases arose under the Fair Labor Standards Act, which like the Federal Employees Pay Act, required overtime pay for employment in excess of a certain number of hours each week.

In the *Armour* case, as in this case, the firefighters were on round-the-clock standby duty. They were subject to call at all times and were not permitted to leave the fire hall. The employer furnished sleeping quarters, pool tables, card tables, radio and other facilities for the convenience and amusement of the employees and while not on active duty they were permitted to sleep and eat and spend their time as they chose on the premises.

The employees contended in the District Court that all of such standby time however spent was employment time. The employer claimed that those hours in which active work was not performed was not employment time. The District Court held that the employees were entitled to be paid for all standby time except that hours spent sleeping and eating were not to be counted as employment time.

The employer appealed, but the employees took no appeal from the judgment insofar as it was adverse to them.

Prior to the time that *Armour's* appeal reached the Court of Appeals for the Seventh Circuit, the firefighters in *Skidmore's* case brought a similar action in which the District Court held that the employees were not entitled to recover for any standby time and on appeal the Court of Appeals for the Fifth Circuit affirmed (136 F. 2d 112), holding that the employees were not "working" merely because they agreed to stay on the employer's premises and be available in case of alarm. "'Working' is not synonymous with 'availability for work'" it held.

When *Armour's* appeal from the District Court reached the Court of Appeals for the Seventh Circuit, *Skidmore's* appeal had already been decided in the Fifth Circuit, and the latter

decision was strongly urged by *Armour* as the controlling law.

In that regard the Court of Appeals in *Armour's* case, said (140 F. 2d 356):

> "Two questions are raised:
>
> (a) * * *
>
> (b) Did plaintiffs work in excess of the maximum hours permitted by Title 29, Sec. 207, U. S. C. A., without payment of overtime wages.
>
> * * * * * *
>
> "(b) On the second question the appellant relies heavily on *Skidmore* v. *Swift*, 5 Cir., 136 F. 2d 112 * * *.
>
> "It seems to us that the question is one which only the Court of last resort can answer finally and our conclusion affords but a resting place, as it were, for the passage of this question on its flight from the court of original jurisdiction to the Supreme Court."

"Our conclusion" in the Seventh Circuit was to reject the concept of *Skidmore* that "work is not synonymous with availability for work", the Court of Appeals in *Armour* saying:

> "The only legal question, as we see it, is therefore directed to the ascertainment of the *legal status of the plaintiff to the defendant during the periods when they were subject to call* as auxiliary firemen. Notwithstanding the latitude they had in their activities, we are convinced that *their legal status was that of employee during that time*." (Italics added.)

Concerning so much of the District Court's decision in *Armour* as held that standby time devoted to playing cards or listening to the radio was working time but that standby

time devoted to sleeping and eating was not to be counted as working time, the Court of Appeals in the Seventh Circuit said:

> "Inconsistency is at once suggested when a distinction is made between an employee living in the packing house, who is subject to call, but who is sleeping, and one who is subject to call, and is listening to the radio or playing solitaire. The correctness of the district court's holding that time devoted to sleeping and eating should not be counted as part of overtime, is not before us. The employees have not appealed from that part of the judgment which is adverse to them. Therefore no question of difference between sleeping and eating on the one side and playing solitaire, listening to the radio or reading on the other hand are before us."

On certiorari, this Court affirmed *Armour* and reversed *Skidmore* and it remains to consider the *rationale* upon which the affirmance and the reversal turned in those cases, both of which were decided by this Court on the same day.

This Court summarized *Armour's* contention on certiorari as follows:

> "On these facts the petitioner contends: first . . . and, second, that even if they were within the Act time spent in sleeping, eating, playing cards, listening to the radio or otherwise amusing themselves, cannot be counted as working time." (*Ibid.* p. 128).

In the consideration of the question thus presented, this Court framed the issue as follows:

> "Second. Was it error to count time spent in playing cards and other amusements, or in idleness, as working time?" (*Ibid*, p. 132).

In answer to this question, this Court in *Armour* said:

> "The overtime provisions of the Act * * * apply only to those who are 'employees' and to 'employment' in excess of the specified hours; * * * Here, too, the employer interprets former opinions of the Court as limitations on the Act. It cites statements that the congressional intent was 'to guarantee either regular or overtime compensation for all *actual work* or employment' and that 'Congress here was referring to work or employment * * * as those words are commonly used—*as meaning physical or mental exertion* (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business'." (Italics by the Court.) (*Ibid.* p. 132).

This interpretation by the petitioner Armour of the Congressional intent as to what constitutes compensable hours of employment (which is the counterpart of the interpretation by the Court of Claims below in this case),[2] was rejected by this Court as follows:

> "Of course an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a standby capacity. Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer. Whether

[2] "When Congress passed the Federal Employees Pay Act, we doubt it had in mind the peculiar situation of firefighters, but it does not seem to us reasonable to suppose it meant to compensate an employee merely because he was required to sleep and eat on the employer's premises instead of at home." (*Armstrong v. United States*, Appendix A, p. 6a, *infra*.)

time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances in the case.

That inactive duty may be duty nonetheless is not a new principle invented for application to this Act. In Missouri, K. & T. R. Co. v. United States, 231 U. S. 112, 119; 58 L. Ed. 144, 147, 34 S. Ct. 26, the Court held that inactive time was to be counted in applying a Federal Act prohibiting the keeping of employees on duty for more than sixteen consecutive hours. Referring to certain delays, this Court said, 'In the meantime the men were waiting, doing nothing. It is argued that they were not on duty during this period and that if it be deducted, they were not kept more than sixteen hours. But they were under orders, liable to be called upon at any moment, and not at liberty to go away. They were nonetheless on duty when inactive. Their duty was to stand and wait'."

It would thus seem clear that this Court's pronouncement that

> "Readiness to serve may be hired quite as much as service itself"

constitutes the basis of decision where readiness to serve is the essential ingredient of every moment of standby duty.

This is exemplified by this Court's quotation, in *Armour*, from Mr. Justice Holmes' decision in *Missouri, K. & T. R. Co. v. United States*, 231 U. S. 112 (p. 133 in *Armour*). That quotation, "Under orders, liable to be called upon at any moment and not at liberty to go away" would thus appear to be the foundation upon which this Court has rested the concept that hours of standby duty, however spent, are hours of employment, and compensable as such.

In *Skidmore* v. *Swift*, *supra*, the Court of Appeals in the Fifth Circuit said:

> "These facts give rise to the inquiry whether under the Fair Labor Standards Act an employee is working when he is sleeping, playing pool, dominoes, or the radio merely because he has agreed to stay on the employer's premises and be available in case of an alarm. * * * One must sleep whether at home or abroad, nor is he at work when he is asleep. * * * 'Working' is not synonymous with 'availability for work'."

This is precisely what the Court below held, and this is precisely the concept that was rejected by this Court in *Armour*, and this Court, in reversing the Court of Appeals in *Skidmore*, said:

> "For the reasons set forth in the *Armour & Co.* case decided herewith we hold that no principle of law found either in the statute or in Court decisions precludes waiting time from also being working time." (*Ibid.* at p. 136).

Nevertheless, those courts which have denied compensation for sleeping and eating time have done so upon the *concept* that such portion of waiting time is *precluded* from being working time, the direct antithesis of the holding of this Court in *Skidmore* in the paragraph just above quoted.

If the *rationale* of *Armour* is that when employees are on the alert, during all the hours of their employment (which is the meaning and definition of "standby"), the requirement of their employment is such that they must at once respond to the alarm whether they are playing dominoes or cards, or merely idling away their time, and because of that compulsion their standby hours are compensable hours of employment, then it would seem illogical to suggest that in the light of such a holding an employee's time is compensable when he is required to leave the card table to respond to the alarm, but is not compensable when he is required to leave the luncheon table to respond to the alarm, since a distinction will need to be made between a card table and a luncheon table as a standard by which to grant compensation in one case and deny it in the other.

III

The Construction Of The Pay Act Presents A Question Of Federal Law Which Has Not Been But Should Be Settled By The Supreme Court.

The Court below has declared it to be a rule of general application that one-third of standby time is to be excluded in all cases, regardless of the facts, and that this is "a sensible construction of the Federal Employees Pay Act of 1945."

In *General Electric Co., supra,* after quoting at length from this Court's decisions in *Armour* and *Skidmore*, the Court in the Ninth Circuit said:

> "It is apparent from the above language (in Armour and Skidmore) that whether or not sleeping time falls within the Act depends upon the express or implied agreement of the parties, and in the absence of an agreement, the nature of the service and its relation to the waiting time." (Matter in brackets added) (*Ibid.* at p. 814).

The Court below gave no consideration to the presence or absence of an agreement as to sleeping time, express or implied, either in the case at bar or in the *Armstrong* case upon the authority of which this case was dismissed.

> "There is no surer way to find out what parties meant, than to see what they have done." (*Brooklyn Life Insurance Co.* v. *Dutcher,* 95 U. S. 269, 273; *Manhattan Life Insurance Co.* v. *Wright,* (C. C. A.), 126 F. 82, 87.)

In considering "what they have done", it is necessary to consider that following this Court's decision in *Armour*, the Administrator promulgated the following Regulation governing all Civilian Personnel:

"N.C.P.I.-85.4-4:[3] STANDBY DUTY:—When an employee is placed in a standby status he is placed in a duty status which, under decisions of the Supreme Court (323 U. S. 126), is subject to compensation. As here used, 'standby status' and 'standby duty' are synonymous. Both mean 'work' for pay purposes, whether the employee sleeps or idles away his time while awaiting a call to perform actual work."

Plaintiffs were on standby duty during all the time they were at their post, and N.C.P.I. 85.4-4 is applicable to their employment. It is so stipulated (R. pp. 32, 34).

Accordingly, civilians employed under the N.C.P.I. 85.4-4 Regulation would not fall within the ambit of the *Bowers, Bell* and *Rokey* cases (*supra*) in the Seventh and Eighth Circuits (where sleeping time was disallowed because the employment contract in those cases expressly provided that the employees would be paid only sixteen out of the twenty-four hours they were on post),[3] since, in N.C.P.I. 85.4-4 cases the Regulation specifically provides that *all* standby time is "work for pay purposes, whether the employee sleeps or idles away his time while awaiting a call to perform actual work."

---

[3] This circumstance was considered to be the distinguishing and controlling factor by the Court of Appeals for the Ninth Circuit in *General Electric Co.* v. *Porter*, where the Court stated (208 F. 2d at p. 815):

"The absence of an express or implied agreement in this case as to sleeping time * * * distinguishes this case from those instances where sleeping time has been disallowed. *Bowers* v. *Remington Rand*, 7 Cir. (1946), 159 F. 2d 114, cert. den. 331 U. S. 864; *Rokey* v. *Day & Zimmerman*, 8 Cir., (1946), 157 F. 2d 734, cert. den. 330 U. S. 842.

In cases where sleeping time has been denied as compensable work time the employees had voluntarily entered into employment contracts which expressly provided that they would be paid only sixteen out of the twenty-four hours they were required to remain on the employer's premises subject to call. *Bell* v. *Porter*, 7 Cir. 1946, 159 F. 2d 117, cert. den. 330 U. S. 813 * * *."

If *all* standby time, including sleeping time, is working time under the Administrative Regulation, and if "all hours of employment" are compensable under the Pay Act, then, in declaring only two-thirds of the time on duty to be compensable the Court will necessarily have assumed the legislative function.

This presents an important question of federal law which has not been but ought to be settled by the Supreme Court.

CONCLUSION

As matters presently stand, the law is unsettled to such extent that the right of Federal civilian employees to compensation under the same statute depends upon the circuit in which their claim is presented, and whether relief be granted in one case or denied in the other, the outcome in each is founded upon this Court's decision as authority whichever way the case goes. This is an unseemly state of the law.

The petition for certiorari should therefore be granted.

Dated, New York, April 1, 1959.

Respectfully submitted,

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Attorney for Petitioners.

Certificate of Service

I, OTIS MARK WATERS attorney for petitioners in the foregoing petition for a writ of certiorari, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 8th day of April, 1959, pursuant to Rule 33(2) of the Rules of this Court, I served copies of the foregoing petition for a writ of certiorari on the United States of America, Respondent, by causing copies thereof to be mailed in a duly addressed envelope, with postage prepaid, to the Solicitor General, Department of Justice, Washington 25, D.C., the attorney for the Respondent.

Dated, April 8th, 1959.

OTIS MARK WATERS,
Attorney for Petitioners.

APPENDIX A

Opinion and Judgment Below

(Caption Omitted)

No. 232—57

(Decided January 14, 1959)

ON PLAINTIFFS' AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

PER CURIAM: This case is before the Court on plaintiffs' and defendant's motions for summary judgment. It is another case brought by firefighters claiming compensation for the time they were required to remain at their post of duty but during which they were permitted to eat and sleep.

On the authority of the opinion in *Merlin M. Armstrong, et al.* v. *United States*, No. 145—56, this day decided, plaintiffs' motion for summary judgment is overruled. Defendant's motion for summary judgment is granted, and plaintiffs' petition is dismissed.

Defendant files counterclaims seeking to recover from plaintiffs on the theory that more than eight hours were set apart for eating and sleeping, for which plaintiffs have been paid.

Plaintiffs were in a standby status during all the time they were at their post, and, although they might have slept more than the eight hours for which they were not paid, we think they are nevertheless entitled to compensation therefor, for the reasons set forth in the *Armstrong* case, *supra*, and other cases therein cited. Compensation for two-thirds of the 24 hours plaintiffs were on duty seems to us to be a sensible construction of the Federal Employees Pay Act of 1945 (59 Stat. 295).

Defendant's counterclaims are accordingly dismissed.

It is so ordered.

Appendix A

Opinion Below in Merlin M. Armstrong, et al.

No. 145—56

(Decided January 14, 1959)

MERLIN M. ARMSTRONG, ET AL. v. THE UNITED STATES

OPINION

WHITAKER, *Judge*, delivered the opinion of the court:

This case, brought by some 88 firefighters at the Tinker Air Force Base at Oklahoma City, Oklahoma, involves their right to compensation for the time they were required to spend on the employer's premises, subject to call, but during which they were permitted to eat or sleep.

The case arises under the Federal Employees Pay Act of 1945 (59 Stat. 295), and, for a portion of the period, under the amendment thereof on September 1, 1954, designated the Premium Pay Act (68 Stat. 1114; 5 U. S. C. 926).

1. Section 201 of the Federal Employees Pay Act of 1945 reads, in part, as follows:

> "Section 201. Officers and employees to whom this title applies shall, in addition to their basic compensation, be compensated for all hours of employment officially ordered or approved, in excess of forty hours in any administrative work week, at overtime rates, as follows * * *.
>
> [For employees receiving compensation of less than $2980 per annum, the overtime was one and one-half times the basic hourly rate of compensation, but, as the basic salary increased, the percentage of the basic rate for overtime decreased.]

Appendix A

The basic question presented is what Congress meant by the words, "hours of employment." Did it intend to include therein time during which an employee was required to remain on the employer's premises but during which he could eat or sleep?

The first cases to reach the courts, in which the meaning of the words was in issue, were *Wantock v. Armour & Co.*, 140 F. 2d 356; 323 U. S. 126; and *Skidmore, et al. v. Swift & Co.*, 136 F. 2d 112; 323 U. S. 134. They involved claims of firefighters for compensation for all the time they were required to remain on the employer's premises in a standby status, including sleeping and eating time. They arose under the Fair Labor Standards Act, but this Act, as also the Federal Employees Pay Act, required overtime pay for "employment" beyond a certain number of hours. In both cases the employees claimed that all standby time should be included in hours of employment, even though a part of it was spent in eating and sleeping. The employer claimed that, since no labor was performed in any standby time, the employee was not entitled to compensation therefor.

In *Wantock v. Armour & Co., supra,* the District Court held that the employee was entitled to be paid for all standby time, except that spent in eating and sleeping. The employer appealed, but the employee did not. The Court of Appeals for the Seventh Circuit affirmed, 140 F. 2d 356, and the Supreme Court affirmed, 323 U. S. 126.

This case is authority for the right of the employee to recover compensation for standby time that does not include eating and sleeping time. His right to recover for eating and sleeping time was decided only by the District Court, which held he could not recover therefor.

In *Skidmore, et al. v. Swift & Co., supra*, the District Court held that the employees were not entitled to recover for any standby time, and the Court of Appeals for the Fifth Circuit affirmed, 136 F. 2d 112. On certiorari by the Supreme Court

the lower courts were reversed, 323 U. S. 134. The Supreme Court held that an employee might have the right to recover for standby time, depending on the facts of the particular case, and it remanded the case for findings of fact and for further proceedings. It did not specifically decide whether or not recovery could be had for time spent in eating and sleeping, but it clearly intimated that it could not be.

On pages 138-140 the Supreme Court summarizes Interpretative Bulletin 13 of the Wages and Hours Division, and discusses the weight to be given to it. After summarizing this bulletin the Supreme Court, at page 139, said:

> The facts of this case do not fall within any of the specific examples given, but the conclusion of the Administrator, as expressed in the brief amicus curiae, is that the general tests which he has suggested point to the exclusion of sleeping and eating time of these employees from the workweek and the inclusion of all other on-call time: although the employees were required to remain on the premises during the entire time, the evidence shows that they were very rarely interrupted in their normal sleeping and eating time, and these are pursuits of a purely private nature which would presumably occupy the employees' time whether they were on duty or not and which apparently could be pursued adequately and comfortably in the required circumstances; the rest of the time is different because there is nothing in the record to suggest that, even though pleasurably spent, it was spent in the ways the men would have chosen had they been free to do so.

It then discusses the weight to be given to the views of the Administrator, and concludes,

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while

> not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. • • •

In conclusion it noted: "The courts in the *Armour* case weighed the evidence in the particular case in the light of the Administrator's rulings and reached a result consistent therewith."

Since these decisions, employees have been compensated for standby time, although no work was performed therein, but they have been denied compensation for time spent in sleeping and eating, although during that time they were subject to call. It has been generally understood that this was in accord with the clear intimation of the Supreme Court in the above cases, that an employee was not entitled to compensation for time spent in sleeping and eating, merely because such time was subject to possible interruptions.

This has been the uniform holding of our court, except in two cases where substantial labor was performed during the time set aside for sleeping and eating. *Winsberg* v. *United States,* 120 C. Cls. 511, under the Overtime Pay Act; *Gaetke* v. *United States,* 136 C. Cls. 756; *Collins* v. *United States,* No. 141-56, and *Avary* v. *United States,* No. 266—56, both decided on March 5, 1958; and *Ahearn, et al.* v. *United States,* No. 332—55, decided May 7, 1958, all under the Federal Employees Pay Act.

In *Farley* v. *United States,* 131 C. Cls. 776, and in *England* v. *United States,* 133 C. Cls. 768, compensation was allowed because substantial labor was performed during the time set apart for sleeping and eating.

The Court of Appeals for the Seventh Circuit has been of the same opinion. In addition to *Wantock* v. *Armour & Co., supra*, see *Bowers* v. *Remington Rand,* 159 F. 2d 114, and *Bell* v. *Porter,* 159 F. 2d 117, decided after the Supreme Court's opinion in *Wantock* v. *Armour & Co., supra.*

Appendix A

The contract between the Alaska Railroad and its fire fighters provided for overtime for standby time, except for eating and sleeping time, for which no compensation was to be paid. Of the total time spent on the employer's premises two-thirds were compensable, and one-third, not compensable. In *Gaetke, et al.* v. *United States, supra*, we said that this voluntary agreement between employer and employee "was a sensible and realistic application of the statute [The Federal Employees Pay Act] to the peculiar requirements of plaintiffs' jobs."

Later, the Civil Service Commission, which, by section 603 of the Federal Employees Pay Act, was given power to make regulations, promulgated a regulation of the same tenor as the contract in the *Gaetke* case, to wit, compensation for two-thirds of the time spent on the employer's premises, and no compensation for eating and sleeping time.

The Comptroller General approved payments made in accordance with the rule. 25 Comp. Gen. 161.

There is thus respectable authority for the exclusion of eating and sleeping time from compensable time spent on the employer's premises: first, the contract between employer and employee, involved in the *Gaetke* case; second, the Civil Service Commission regulation; third, the ruling of the Comptroller General; fourth, the decisions of the Court of Appeals of the Seventh Circuit, and of this court; and, fifth, the clear intimation of approval by the Supreme Court in *Skidmore* v. *Swift & Co., supra*. Lastly, we think Congress in the Premium Pay Act of 1954, has given implied approval of the principle underlying the Civil Service regulation. That Act permits a maximum of 25 percent premium pay for standby time. Under the formula of the Civil Service Regulations a firefighter gets paid from 20 percent to 33⅓ percent for his standby time; he receives nothing for eating and sleeping time. (The variance in the percentage depends on his basic pay.)

If these employees are compensated in accord with the Civil Service Regulations and without previous holdings, they will get approximately the same as what they would get under the Premium Pay Act of 1954.

Not only is this ruling supported by authority, it seems to us to be "a sensible and realistic application of the statute to the peculiar requirements of plaintiffs' jobs." When Congress passed the Federal Employees Pay Act, we doubt it had in mind the peculiar situation of firefighters, but it does not seem to us reasonable to suppose it meant to compensate an employee merely because he was required to sleep and eat on the employer's premises instead of at home. This seems so even if he was subject to call during his sleeping and eating time, and if he was in fact called, provided that he was paid for all hours, except those during which he was actually free to eat and sleep.

We feel assured, therefore, that the regulation of the Civil Service Commission gives effect to the fundamental intent of Congress to fairly and justly compensate Federal employees for their services to the Government. We cannot believe that Congress meant to compensate them for time spent in sleeping on the job. If eight hours out of the 24 were allowed for sleeping and eating, these plaintiffs have been fully compensated.

What are the facts in this case?

Plaintiffs were on duty on alternate days for 24 hours a day, a total of 72 hours per week. For 40 hours plaintiffs were paid straight time, and for an additional 8 hours they were paid overtime at the statutory rate. For the balance of the time, which was supposed to be devoted to eating and sleeping, they were paid nothing. Plaintiffs were not permitted to sleep during the daytime, but they were permitted to do so from 8 p.m. to 7 a.m., unless during that time some emergency prevented. As a matter of choice, however, many of the plaintiffs retired between 11 p.m. and midnight.

Appendix A

Logs were kept of emergency calls during the time set apart for sleep. These logs do not seem to be as accurate as we would like, but, such as they are, they show a total of about 266 interruptions during sleeping hours in 1954 for "emergency landings", "crash standby and fireguard", "gasoline wash down" and "false alarms", 208 for 1955, and 238 for 1956. All three stations had to respond to an emergency landing alarm. Each such alarm consumed about 20 minutes. There were an average of about 50 per year. Thus approximately 17 hours per year were consumed in answering such alarms. The other alarms consumed from 15 to 30 minutes. Ordinarily only a part of the men from one station answered the other alarms. The average number per year was about 190, or something over 60 per station. If we allow 30 minutes for each alarm, this eans 30 hours per year. At a maximum, not more than 50 hours per year, or about one hour per week, are to be deducted from the 11 hours of sleeping time for these interruptions. The miscellaneous interruptions were inconsequential, consuming the time of only one man, probably once a year.

The findings also show that each fireman had to stand watch one hour each night. This makes a total of not more than two hours to be deducted from the time set apart for sleeping. This would leave a total of 9 hours during which plaintiffs were permitted to sleep. In addition to this, they were allowed two hours for eating. Thus, the total time for eating and sleeping was probably about 11 hours out of the 24. There can be no doubt that these plaintiffs were allowed much more than 8 hours for eating and sleeping and, therefore, that they have been compensated for all hours spent in a duty status, except for eating and sleeping time.

The Premium Pay Act of September 1, 1954, *supra*, necessitated the keeping of an accurate account of the number of hours of actual work. The chief of the Fire Protection and Aircraft Crash Rescue Branch, Installations Division, and

the chief of the Fire Department and his two assistants, made a calculation of the actual number of hours the firemen worked. (The two assistant chiefs are plaintiffs in this case.) This computation shows that on the average each firefighter worked 32.55 hours per week. Under the Civil Service Regulation in effect prior to September 1, 1954, they have been paid for 48 hours per week.

It would appear, therefore, that plaintiffs have been compensated for all work actually performed and for all time in a standby status, except for 8 hours set apart for eating and sleeping. Since, in fact, plaintiffs were allowed more than 8 hours for eating and sleeping, they have been fully compensated under the Federal Employees Pay Act of 1945, *supra*.

2. After the passage of the Premium Pay Act of September 1, 1954; *supra*, some of the plaintiffs elected to come within its provisions, but they now claim compensation on the same basis as the other plaintiffs, because of the provisions of section 401 (b) of the Premium Pay Act, which reads: "Nothing contained in this section shall be construed to decrease the existing aggregate rate of compensation of any present employee * * *." However, inasmuch as we have held that under the rate of compensation in effect prior to the passage of the Premium Pay Act of 1954 plaintiffs are not entitled to recover, we do not need to consider the other provisions of the Premium Pay Act.

It results that plaintiffs are not entitled to recover and their petition will be dismissed.

It is so ordered.

EDGERTON, *Circuit Judge*, sitting by designation; LARAMORE, *Judge*; MADDEN, *Judge*, and JONES, *Chief Judge*, concur.

FILE COPY

FILED
MAY 7 1959
JAMES R. BROWNING, Clerk

No. 839

In the Supreme Court of the United States

OCTOBER TERM, 1958

EARL E. WRIGHT, JR., ET AL., PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Claims in the present case (Pet. App. 1a) and in the companion case of *Merlin M. Armstrong, et al.* v. *United States*, 145–56, January 14, 1959 (Pet. App. 2a–9a) are not yet reported.

JURISDICTION

The final judgment of the Court of Claims was entered on January 14, 1959 (R. 75). The petition for a writ of certiorari was filed on April 14, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether civilian firefighters employed by the Department of the Navy and the General Services

Administration are entitled, under the Federal Employees Pay Act of 1945, to compensation for periods of on-call time specifically set aside for eating and sleeping.

STATUTE AND REGULATION INVOLVED

The Federal Employees Pay Act of 1945, 59 Stat. 295, as amended, 5 U.S.C. 901 *et seq.*, provides in pertinent part:

> SEC. 201. Officers and employees to whom this title applies shall, in addition to their basic compensation, be compensated for all hours of employment, officially ordered or approved, in excess of forty hours in any administrative workweek, at overtime rates as follows: * * *. [5 U.S.C. 911.]
>
> * * * * *
>
> SEC. 301. Any officer or employee to whom this title applies who is assigned to a regularly scheduled tour of duty, any part of which, including overtime, falls between the hours of 6 o'clock postmeridian and 6 o'clock antemeridian, shall, for duty between such hours, excluding periods when he is in a leave status, be paid compensation at a rate 10 per centum in excess of his rate of basic compensation for duty between other hours: * * *. [5 U.S.C. 921.]

Navy Civilian Personnel Instruction 85, as amended, provides in pertinent part:

> SEC. 4-4. STANDBY DUTY.—When an employee is placed in a standby status he is placed in a duty status which, under decisions of the Supreme Court (323 U.S. 126), is subject to compensation. As here used, "standby status"

and "standby duty" are synonymous. Both mean "work" for pay purposes, whether the employee sleeps or idles away his time while awaiting a call to perform actual work. * * *

* * * * *

SEC. 4–5x. * * * Under the rule, two-thirds of each hour on duty is credited as pay time. The first 60 hours on duty, less one-third or 20 hours allowed for sleeping and eating, is regarded as the basic 40-hour workweek. The straight time payable during the basic workweek is two-thirds of the hourly rate of pay for each of the first 60 hours of duty. Night work pay is computed on the basis of two-thirds of the hourly night work rate for the hours of the workday during which the night differential is payable. For the "overtime" portion of the scheduled workweek, overtime is credited at two-thirds the hourly overtime rate. Holiday premium pay is credited at two-thirds the hourly premium rate for not more than 12 hours of the holiday. An employee to whom the two-thirds rule is applied is charged two-thirds of an hour's pay, rather than an hour's pay, for each hour in a nonpay status on a workday within his basic workweek.* * *

* * * * *

STATEMENT

Petitioners, civilian firefighters employed at various times by the Department of the Navy and the General Services Administration, seek overtime and night-differential compensation, under the Federal Employees Pay Act of 1945, for periods of on-call time

specifically set aside for eating and sleeping (R. 1–3).[1] The pertinent facts, which were stipulated (R. 31–35, 102–03), may be briefly summarized as follows:

Prior to May 1, 1955, petitioners Wright and Snowman were employed as firefighters by the Navy Department at certain of its installations. They performed three 24-hour tours of duty per week. On May 1, 1955, responsibility for these installations was transferred to the General Services Administration, and Wright and Snowman thereafter worked two 24-hour and one 12-hour tours of duty per week (R. 33). Petitioner Van Sickle was employed at these installations as a guard on a 40-hour per week basis prior to May 1, 1955, and as a firefighter-guard on a 60-hour per week basis after that time (R. 102–03).

All of the petitioners were compensated by both agencies for firefighting duties pursuant to the so-called "two-thirds rule." (R. 33, see p. 3, *supra*.) Under this method of compensation, one-third of a tour of duty, although time when a firefighter is subject to call and must remain on government premises, is set aside for eating and sleeping and is non-compensable. The remaining two-thirds of the tour is divided equally between active work time and an inactive stand-by period. Both of these periods are considered to be compensable hours of employment, and are subject to the application of overtime and night-differential rates.

[1] The Government's counterclaims for certain amounts of hourly and night-differential pay, received for time spent in eating and sleeping, were dismissed.

In the present case, petitioners received pay for 48 hours (40 hours at the regular rate and 8 hours at the overtime rate) when on the 72-hour week, and received pay for 40 hours when on the 60-hour week. Night-differential pay was credited for two-thirds of the nighttime duty hours. They were permitted to sleep from 7 o'clock P.M. until 7 o'clock A.M. during each 24-hour tour of duty and were required to be in bed by 11 o'clock P.M., at which time a bed check was made (R. 32). Petitioners were allowed three meal periods of at least 30 minutes' duration in each 24-hour shift (R. 56).

The occasional work which petitioners were called upon to perform during periods set aside for eating and sleeping constituted *de minimis* interruptions of such eating and sleeping time. Petitioners seek no recovery for the minimal amount of work performed during those periods (R. 102–03).

The Court of Claims denied recovery on the authority of the companion *Armstrong* case, decided the same day, in which it held that firefighters working under substantially identical conditions were not "entitled to compensation for time spent in sleeping and eating, merely because such time was subject to possible interruptions" (Pet. App. 5a).

ARGUMENT

In two companion cases this Court considered the question of whether time spent on an employer's premises by firefighters who are subject to call, but who are not engaged in the performance of actual work, constitutes working time for the purposes of

the Fair Labor Standards Act. *Skidmore* v. *Swift & Co.*, 323 U.S. 134; *Armour & Co.* v. *Wantock*, 323 U.S. 126. The Court held that the question cannot be resolved on the basis of any legal formula, but is a question of fact to be resolved by appropriate findings of the trial court in the light of all of the circumstances of each case. Since the *Armour* and *Skidmore* decisions, the Court has consistently refused to review lower court decisions dealing with the compensability of such time under varying factual situations. *E.g., General Electric Co.* v. *Porter*, 208 F 2d 805 (C.A. 9), certiorari denied, 347 U.S. 951; *Glenn L. Martin Nebraska Co.* v. *Culkin*, 197 F. 2d 981 (C.A. 8), certiorari denied, 344 U.S. 866; *Bell* v. *Porter*, 159 F. 2d 117 (C.A. 7), certiorari denied, 330 U.S. 813; *Bowers* v. *Remington Rand*, 159 F. 2d 114 (C.A. 7), certiorari denied, 330 U.S. 843; *Rokey* v. *Day & Zimmermann*, 157 F. 2d 734 (C.A. 8), certiorari denied, 330 U.S. 842; *Sawyer* v. *United States*, 138 C. Cls. 152, certiorari denied, 355 U.S. 868; *Conn* v. *United States*, 107 C. Cls. 422, certiorari denied, 332 U.S. 757. In the two cases last cited, this Court declined to review decisions of the Court of Claims with respect to the rights, under applicable pay statutes, of civilian firefighters employed by the Government. The present case is simply another in this series. It does not present any new general question, nor is it in conflict with any other decision (each of which depends upon its own particular facts), and, accordingly, further review here is not called for.

1. In *Armour & Co.* v. *Wantock*, *supra*, the district court had held that firefighters employed by a private

company were not entitled to compensation for stand-by time normally set aside for eating and sleeping but were entitled to be paid for the remaining hours on call during which no actual work was performed. Both the court of appeals and this Court affirmed that portion of the judgment which was adverse to the employer; the employees, who had contended that all stand-by time was compensable, took no appeal. Thus, the precise issue in the present case—whether eating and sleeping time is compensable—was not specifically resolved. The Court pointed out, however, that (323 U.S. at 133):

> Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer. Whether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case.

In *Skidmore* v. *Swift & Co., supra,* decided on the same day, this Court reversed a lower court decision refusing any recovery whatever for on-call time during which no actual work was performed. The Court held that no principle of law precluded a determination that waiting time was working time and that "Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court. * * * Each case must stand on its own facts." (323 U.S. at 136–37, 140.) Again, the question of compensation for relatively long, uninterrupted periods of waiting time set aside for eating and sleeping was not directly in issue.

But the Court discussed with approval the way in which the Administrator of the Wage and Hour Division had resolved the entire problem administratively (323 U.S. at 138–39). The Administrator had concluded that a flexible solution was necessary and that in some situations periods of inactivity are not properly counted as working time *even though the employee is subject to call,* such as portions of a 24-hour tour of duty when the employee "has a normal night's sleep, has ample time in which to eat his meals, and has a certain amount of time for relaxation and entirely private pursuits." (323 U.S. at 138.) With respect to firefighters, the Court noted with approval the conclusion of the Administrator, expressed in his brief *amicus curiae* in that case, that the appropriate standard called for "the exclusion of sleeping and eating time of these employees from the workweek and the inclusion of all other on-call time: although the employees were required to remain on the premises during the entire time, the evidence shows that they were very rarely interrupted in their normal sleeping and eating time, and these are pursuits of a purely private nature which would presumably occupy the employees' time whether they were on duty or not and which apparently could be pursued adequately and comfortably in the required circumstances * * *." (323 U.S. at 139.)[2]

We submit that the Court of Claims correctly applied these principles in holding that petitioners were

[2] This is also the understanding which the Senate Committee on Post Office and Civil Service has of the Federal Employees Pay Act. In recommending a proposed amendment to that

fully compensated by being paid both for the time actually worked and for the inactive period of standby duty, and are not entitled to additional compensation for time spent in eating and sleeping, even though they were subject to call during those periods. As stipulated by the parties, petitioners were permitted to sleep from 7 o'clock P.M. until 7 o'clock A.M. during each 24-hour shift and were allowed three meal periods of at last 30 minutes' duration each (R. 33, 56). Any interruptions for work during these periods were *de minimis* and, accordingly, petitioners sought no recovery for such interruptions but only for time spent eating and sleeping during regular, lengthy periods set aside for such purposes. A recovery of this kind would be unprecedented and contrary to the consistent practice under both the Fair Labor Standards Act and applicable federal pay statutes.

2. Petitioners contend (Pet. 6–8) that the decision below is in conflict with certain appellate decisions under the Fair Labor Standards Act. As noted

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Act, the Committee said (S. Rep. No. 687, 85th Cong., 1st Sess. p. 2):

"The equity of the bill lies in the fact that under its terms each fire fighter or other 'long-tour standby' employee would be paid for unscheduled and irregular overtime beyond his established tour on exactly the same basis as other Federal employees. In that respect the committee desires to make clear that overtime would not be paid for time allowed for eating and sleeping during overtime assignments. This is consistent with the provisions of the Federal Employees Pay Act under which standby employees paid under the regular hourly premium pay provisions are not paid for uninterrupted periods allowed for sleeping and eating and the Fair Labor Standards Act which does not require that standby employees in industry be paid for such periods."

above, under *Armour* and *Skidmore*, the result reached in a given case must depend upon its peculiar facts and circumstances. The alleged conflicts merely reflect the different factual situations involved in those cases.

In *Central Missouri Tel. Co.* v. *Conwell*, 170 F. 2d 641 (C.A. 8), the court held that an employer could not deduct 3 hours as sleeping time from an 11-hour shift of night telephone operators. The decision was based on the fact that the operators could rest only as duties permitted, constantly had to attend to the switchboard and other work matters during the entire tour, and on many nights were disturbed at frequent intervals. Thus, the operators were not only in readiness but rendered considerable service for which they had received no compensation. The court distinguished on these grounds its own decision in *Rokey* v. *Day & Zimmermann, supra*, that on-call time of firefighters involving long periods of uninterrupted sleep was not compensable.

Similarly, in *Biggs* v. *Joshua Hendy Corp.*, 183 F. 2d 515 (C.A. 9), the Court of Appeals affirmed a trial court's finding that the employees were entitled to compensation for lunch periods since they were required to work during those periods. And in *F. W. Stock & Sons, Inc.* v. *Thompson*, 194 F. 2d 493, the Sixth Circuit held that mechanics' and engineers' "lunch periods" were compensable since the time was spent predominantly for the employer's benefit watching and caring for machinery—"a man who has to oil machinery with a sandwich in his hand

is not having a "free lunch period." (194 F. 2d at 496.)

In *General Electric Co.* v. *Porter*, 208 F. 2d 805, certiorari denied, 347 U.S. 951, the Ninth Circuit, noting that whether or not sleeping time of firefighters is compensable depends upon the circumstances, took into account that the firefighters had to protect not only the employer's plant area but two populous communities as well, thus greatly increasing the probability of an alarm at night. And finally in *Mitchell* v. *Strickland Transportation Co.*, 228 F. 2d 124, the Fifth Circuit stated with respect to a night watchman that "as we hold the relationship to be employment, no deduction is to be made for times his wife, or members of his family spelled him on the job, whether he was resting, sleeping, * * * or otherwise engaged on the premises." (228 F. 2d at 128–29, fn. 14.)

Since each of these decisions thus turns on its own facts, they do not present any conflict requiring resolution by this Court.[3]

[3] Petitioners' reliance on Navy regulations (Pet. 16–18) is entirely misplaced. Section 4–4 of NCPI 85 (*supra*, pp. 2–3) is nothing more than an adoption of this Court's decisions in the *Armour* and *Skidmore* cases (cited in the regulation) that on-call time may be compensable even though no actual work is performed. The stand-by time referred to is one part of the 24-hour shift which is also divided into working time, and sleeping and eating time. It is only the latter that is in issue here, not the inactive stand-by period. That this is the correct meaning of Section 4–4 is made absolutely clear by Section 4–5x of the same regulation (*supra*, p. 3), which sets out the two-thirds method of compensation.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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In The

Supreme Court of the United States

October Term, 1958

No. 839

EARL E. WRIGHT, Jr., et al.,

Petitioners,

—v.—

THE UNITED STATES,

Respondent.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Statement

The Government contends (br. p. 10) that under *Armour* and *Skidmore*, the result reached in a given case must depend upon its peculiar facts; that the alleged conflicts between the Courts merely reflect the factual situations involved in those cases, that (p. 6) this case does not present any new general question calling for review by this Court and that (p. 8) the Court of Claims correctly held that sleeping and eating time is not compensable even though petitioners were subject to call during such time.

It is the burden of this reply brief to demonstrate (1) that the court below held as a matter of law that there can be no recovery in any case for sleeping and eating time, regardless of the facts; (2) that a new general question has been presented for review by this Court consisting of the judicial construction of the Pay Act, made below for the first time by any court, that the statute forbids compensation for sleeping and eating time, and

(3) that the decision below is in conflict with the applicable decisions of this Court and with the decisions of the Courts of Appeal in certain circuits.

ARGUMENT

1. The case at bar holds sleeping and eating time non-compensable as a matter of law.

There was no resolution of facts peculiar to petitioners' case to determine whether "time spent lying in wait for threats . . . is spent predominantly for the employer's benefit . . .", (323 U. S. at 133) The Court of Claims said only:

> "On the authority of the opinion in *Merlin M. Armstrong et al* v. *United States*, No. 145-56 this day decided • • • plaintiffs' petition is dismissed." (Ap. 1a)

Although plaintiffs' petition was dismissed on the authority of *Armstrong*, there was no determination hat the facts of petitioners' case are the same as, similar to or different from Armstrong's facts. Apart from the words "Upon the authority of the opinion in *Merlin M. Armstrong et al* v. *United States*" the decision below is silent as to Armstrong. But it is plain from the opinion in *Armstrong* (Ap. 2a) that the Air Force firefighters in that case were not, as is the case with petitioners, employed under Naval Administrative Regulation N. C. P. I. 85.4-4 which provides that "Standby status and standby duty are synonymous. Both mean 'work' for pay purposes, whether the employee sleeps or idles away his time while awaiting a call to perform actual work".*

---

* The government contends (footnote, p. 11) that the petitioners reliance on this regulation is misplaced, and that the correct meaning of the regulation is found in Section 4-5x which excludes sleep-

Without reference to the facts of this case the court below read the two-thirds rule into the statute as follows (Ap. 1a):

> "Compensation for two-thirds of the 24 hours plaintiffs were on duty seems to us to be a sensible construction of the Federal Employees Pay Act of 1945 (59 Stat. 295)."

Under that constructiton the facts are academic, and the statute controls. The construction of a statute is a matter of law and not the resolution of facts.

If the decision below is permitted to stand on the case books as authority, it becomes useless to determine

> "Whether, in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court. * * * Each case must stand on its own facts." (323 U. S. at 136-37, 140).

for the compelling reason that whatever the facts may be, the "sensible construction of the Federal Employees Pay Act of 1945" limits compensation by statute in all cases.

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ing time under the "two-thirds" rule. The answer to this contention is that the "two-thirds" rule was in effect prior to *Armour* and was superseded by 4-4 to conform to Armour, and 4-4 so states. Sleeping time which was theretofore excluded under the "two-thirds" rule is expressly made compensable by 4-4.

In another footnote (p. 8) the Government refers to a proposed amendment to the Pay Act (S. Rep. 687, 85th Cong., 1st Sess. p. 2) based upon the understanding of the Senate Committee, that overtime would not be paid for time allowed for sleeping and eating during overtime assignments. The Report shows that the proposed language of the amendment, relied on here by the Government, was adopted by the Committee at the request of the Civil Service Commission. Despite the request of the Commission and the Senate Committee's Report, both the House and the Senate refused to enact that provision into law.

The Court of Claims has thereby laid down a rule of law, of general application, enunciated for the first time by any court, that one-third of the time on duty is not compensable under the Pay Act which declares that all hours of employment are compensable.

This raises a new federal question of general application, and constitutes a complete and adequate answer to the Government's suggestion (br. p. 6): "It does not present any new general question, nor is it in conflict with any other decision (each of which depends upon its own particular facts), and, accordingly, further review here is not called for."

Finally, the Government's position that (p. 9) "A recovery of this kind would be unprecedented and contrary to the consistent practice under both the Fair Labor Standards Act and applicable federal pay statutes," is the plainest concession that "consistent practice" requires the denial of compensation for sleeping time regardless of the facts.

This can scarcely be said to be in harmony with *Armour* and *Skidmore*.

2. *Armstrong's* case holds sleeping and eating time to be non-compensable as a matter of law.

The Court of Claims interpreted this Court's decision in *Skidmore* to mean that the question of fact to be determined in each case relates only to standby time which is not sleeping time, and that as to sleeping time, as such, there could in no circumstance be a recovery. Thus, in construing *Skidmore*, the Court below said (Ap. 4a)

> "It [the Supreme Court] did not specifically decide whether or not recovery could be had for time spent in sleeping and eating, but it clearly intimated that *it could not be.*" (Emphasis added.) (Matter in brackets supplied.)

Thereupon the Court below, after observing that "since these decisions (in *Armour* and *Skidmore*) employees have been compensated for standby time although no work was performed therein, but they have been denied compensation for time spent sleeping and eating", and that "It has been generally understood that this was in accord with the *clear intimation of the Supreme Court* in the above cases that an employee was not entitled to compensation for time spent in sleeping and eating" and after also observing that "This has been the uniform holding of our Court", the Court of Claims then disposed of the question of the compensability of sleeping and eating time upon legal *authority* as distinguished from the particular facts of the Armstrong case as follows:

> "There is thus respectable authority for the exclusion of sleeping and eating time from time spent on the employer's premises: first, the contract between employer and employee, involved in the *Gaetke* case; second, the Civil Service Commission regulation; third, the ruling of the Comptroller General; fourth, the decisions of the Court of Appeals of the Seventh Circuit, and of this court; and, fifth, the clear intimation of approval by the Supreme Court in *Skidmore* v. *Swift & Co. supra.*"

There was no determination in *Armstrong* whether "Facts may show that the employee was engaged to wait or waited to be engaged" (323 U. S. at 136).

In addition to the aforesaid five categories of authority for the exclusion of sleeping time from compensable time, the Court of Claims held in *Armstrong* as a matter of law that sleeping time is not compensable under the Pay Act because Congress did not intend to include sleeping time in the statutory words "hours of employment". Thus, (Ap. 2a-3a):

> "The *basic question* presented is *what Congress*

> *meant* by the words 'hours of employment'. Did it intend to include therein time during which an employee was required to remain on the employer's premises but during which he could eat or sleep?". (Emphasis added.)

The congressional intent was thereupon construed below as follows (Ap. 7a):

> "When Congress passed the Federal Employees Pay Act, we doubt it had in mind the peculiar situation of firefighters, but it does not seem to us reasonable to suppose it meant to compensate an employee merely because he was required to sleep and eat on the employer's premises instead of at home."

Thus the Court of Claims adopted the concept that sleeping time may not be work. That is precisely the concept that was rejected by this Court in *Skidmore*, when, in reversing the holding of the Court of Appeals in the Fifth Circuit that "One must sleep whether at home or abroad, nor is he at work when he is asleep. . . . 'Working' is not synonomous with 'availability for work'.", this Court declared (323 U. S. at 140):

> But in this case, although the District Court referred to the Administrator's Bulletin, its evaluation and inquiry were apparently restricted by its notion that waiting time may not be work, an understanding of the law which we hold to be erroneous. Accordingly the judgment is reversed and the cause remanded.

3. Reply to Government contention that there exists no conflict of decision.

The Government contends (p. 6) that this Court in *Armour* and *Skidmore* held that the question cannot be resolved on the basis of any legal formula, but is a question of fact to be resolved by appropriate findings of the trial court in the light of all the circumstances, and (p. 7) quotes to that effect from *Armour* as follows (323 U. S. at 133):

> "Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treaetd by the parties as a benefit to the employer. Whether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case."

On this point the Government also quotes (p. 7) from *Skidmore* (323 U. S. 136-7) as follows:

> "Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by the trial court. * * * Each case must stand on its own facts."

Omitted from the foregoing quotation (represented by asterisks) is the following:

> "This involves scrutiny and construction of the agreement between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all the surrounding circumstances. *Facts may show that the employee was engaged to wait or waited to be engaged.* His compensation may cover

> both waiting and task, or only performance of the task itself. Living quarters may in some situations be furnished as a facility of the task and in another as a part of its compensation. The law does not impose an arrangement on the parties. It imposes upon the Courts the task of finding what the arrangement was." (Emphasis added.)

It is clear from the quotation in *Armour* that the test as to whether "readiness to serve" has been hired, is a factual determination as to "whether time is spent predominantly for the employer's benefit" and it is equally clear from the quotation in *Skidmore* that the test is a determination whether "Facts may show that the employee was engaged to wait or waited to be engaged."

Diametrically opposed to this concept is the decision of the Court of Claims which holds it to be "the clear intimation of the Supreme Court" that there cannot be a recovery for sleeping and eating time, that the Congress did not intend to include such time as hours of employment, and that a sensible construction of the Pay Act is that only two-thirds of the time on duty is compensable.

Under the decision below each case no longer rests on its own facts and it is no longer necessary to determine, as in *Armour*, whether the time was spent predominantly for the employer, or, as in *Skidmore*, whether the employee was engaged to wait or waited to be engaged, because the decision below holds statutory construction and the clear intimation of the Supreme Court to make such factual inquiries superfluous.

The decision below is not only in direct conflict with *Armour* and *Skidmore*, but also with *General Electric Co.* v. *Porter* (CA 9-1953), 208 F. 2d 805; *F. W. Stock & Sons* v. *Thompson* (CA 6-1952), 194 F. 2d 493, and each of the cases in the 5th, 8th and 9th circuits cited on page of the petition.

It scarcely requires argument to demonstrate the conflict. The Court in the Ninth Circuit in *General Electric*

supra, held that the employees were engaged to wait and said simply it is "our holding that the firemen are entitled to compensation for sleeping and eating time", whereas the Court of Claims has held in this case and in *Armstrong* that there can be no recovery in any case for sleeping and eating time. This direct conflict of decision runs not only to the Ninth Circuit, but to each of the mentioned circuits which have held such time to be compensable.

CONCLUSION

The Court of Claims has read into the statute the "two-thirds" rule and has read out of the Administrative Regulations NCPI 85.4-4. It has held that a sensible construction of the Pay Act precludes recovery at any time and in any case for sleeping and eating time on standby duty. A new question of general application has clearly been presented which has not been but should be settled by this Court.

The petition for certiorari should therefore be granted.

Dated, New York, May 19, 1959.

Respectfully submitted,

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